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In the Supreme Court of the United States.

October Term, A. D. 1906.

No. 143.

AMERICAN SMELTING AND REFINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ON THE RELATION OF HENRY A. LINDSLEY, DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Colorado.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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Attorney General, for Defendant in Error.

Smith-Brooks Press, Denver.

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LAW AS TO CLASSIFICATION.

Plaintiff in error contends that it is a person within the meaning of the Fourteenth Amendment to

the Constitution of the United States, and is entitled to the equal protection of the law.

It claims that it was admitted to do business in the state of Colorado and has complied with all the laws requisite for its admission into the state; that a compliance was made with all the laws relating to the admission of foreign corporations previous to the enactment of the revenue statutes involved in this case. It was therefore rightfully in the state of Colorado previous to the imposition of the present form of taxation. It therefore denies the application of all those decisions sustaining a special tax or a charge as a condition precedent to the admission of a foreign corporation into the state to do business.

Our contention is that it is admitted into the state for a period of twenty years, subject, however, to the powers of the state to tax. Among these powers is the right of the state to tax the privilege of carrying on business.

On the other hand, the plaintiff in error represents that it is protected against unlawful discriminations, and that to tax a corporation for the privilege of carrying on business, while natural persons are exempt, is a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

It is conceded that a corporation is a person within the meaning of the Fourteenth Amendment to the Constitution of the United States. We also admit that the right to tax a corporation for the privilege of carrying on business, while individuals are exempt from a similar imposition, can only be sustained by pointing out some reasonable ground for distinction.

—some principle that will place the business conducted by a corporation in a class by itself, when considered with reference to the business carried on by a natural person.

The distinguishing principle adopted in making the classification must have some natural bearing upon the subject sought to be attained.

Billings vs. Illinois, 188 U. S., 97.

> "That the franchises, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business and by the state which creates them, admits of no dispute at this day."
>
> State Railroad Tax Cases, 92 U. S., 575, 603.

The reason corporations are considered persons under the Fourteenth Amendment to the federal Constitution is best expressed by Justice Field in *County of Santa Clara vs. Southern Pacific Railroad Co.*, 18 Fed. Rep., 387, 403.

> "Whatever affects the property of the corporation—that is, of all the members united by the common name—necessarily affects their interests. If all the members of the corporation die or withdraw from the association, the corporation is dead; it lives and can live only through its members. When they disappear the corporation disappears. Whatever confiscates or imposes burdens on its property, confiscates or imposes

burdens on their property, otherwise nobody would be injured by the proceeding. Whatever advances the prosperity or wealth of the corporation, advances proportionately the prosperity and business of the corporators, otherwise no one would be benefited. It is impossible to conceive of a corporation suffering an injury or reaping a benefit except through its members. The legal entity, the metaphysical being, that is called a corporation, can not feel either. So, therefore, whenever a provision of the Constitution or of a law guarantees to persons protection in their property, or affords them the means for its protection, or prohibits injurious legislation affecting it, the benefits of the provision or law are extended to corporations; not to the name under which different persons are united, but to the individuals composing the union. The courts will always look through the name to see and protect those whom the name represents. Thus, inasmuch as the Constitution extended the judicial power of the United States to controversies between citizens of a state and aliens and between citizens of different states, because its framers apprehended that state tribunals in such controversies might be swayed by local feelings, prejudices, or attachments, Chief Justice Marshall, speaking for the whole Supreme Court, held that corporations were within the provision. 'Aliens, or citizens of different state,' said that great judge, 'are

not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name. That name, indeed, can not be an alien or a citizen, but the persons whom it represents may be the one or the other, and the controversy is in fact and in law between these persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals. Such has been the universal understanding on the subject.' *Bank of U. S. vs. Deveaux*, 5 Cranch, 61, 87."

The limitations upon the power of the state to classify is well expressed by this court in American Sugar Refining Company vs. Louisiana, 179 U. S., 89, 92. The question before the court in that case was the power of the state to exempt the producer of the raw material, even though he manufactured sugar therefrom, while it imposed a tax upon the manufacturer who purchased the raw material. Justice Brown said:

> "Of course, if such discriminations were purely arbitrary, oppressive, or capricious,

> and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes. But, from time out of mind, it has been the policy of this government, not only to classify for the purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market."

The exemption in this instance was based upon public policy. The state claimed the right to encourage agricultural pursuits and tillers of the soil and encourage them in handling their product from the time the seed was planted and the harvest gathered until the final product of sugar was produced. Such a discrimination had in view the best interests of the people and was calculated to promote the welfare of society and the government.

> "Classification is not necessarily based upon any essential difference in the nature or condition of the various subjects. It may be based as well upon the want of adaptability to the same methods of taxation, or upon the impracticability of applying to the various subjects the same methods, so as to produce just and uniform results; or it may

be based upon just and well grounded considerations of public policy."

Judson on Taxation, section 454.

Commonwealth of Penn. vs. Del. Div. Canal Co., 2 L. R. A., 798, 803.

Narrowing this question down to the precise point urged by plaintiff in error, I understand the contention to be as follows: Can a corporation be taxed for carrying on any business, as, for instance, smelter business, iron business, mining business or grocery business, while the individual is exempt from the same tax?

The right to tax corporations for the privilege of carrying on business, while natural persons are exempt, can be justified on the ground of public policy. We have already seen that this is a just basis for classification.

Years ago corporate business was the exception; to-day it is the rule. It is even safe to say that the legislation of the several states concerning corporations was not framed with the view of dealing with the conditions created by the vast and increasing number of corporations. Indeed, the people may view with solicitude the drifting of all manner and forms of business into the control and ownership of corporations. Their control and management is probably one of the greatest questions of the present age, and I merely refer to these matters, not with any animosity toward corporations, but in order to point out the disadvantage that natural citizens suffer in attempting to carry on business in competition with corporations. I think it can be said, with equal truth, that

it is a reasonable discrimination to tax the business of corporations and exempt the business of natural persons.

A corporation has been defined to be: "A collection of several individuals united into one body, under a special denomination, and having perpetual succession under an artificial form and vested by the policy of the law with the capacity of acting in several respects as an individual."

Black's Law Dictionary, page 279.

The plan of organizing corporations enables one person to combine the capital of a large number of individuals for the purpose of carrying on any particular business. The persons whose money is invested may live in numerous states or even in far distant lands, but the power to do business is invested in a corporation which acts in most matters under the direction of a manager. These persons invest their capital in the stock of the concern for profit, and if the enterprise is a success, they are enabled to derive returns from their investment without in the least interfering with their personal attention to some other business. For instance, it may be safe to say that the money that is invested in the stock of the great steel company came from persons who are giving their attention to business entirely remote. I presume everyone has in mind some commercial enterprise which is carried on by a corporation whose stock is owned by persons engaged in other business. Indeed, it is safe to say that nearly all large enterprises of the country are capitalized and conducted in this manner. The result of the power of corpora-

tions to aggregate capital is to drive out of business natural persons. This is a matter of common knowledge. If, therefore, it is correct to say that the subjects of taxation may be classified upon considerations of public policy, I believe the plan of taxing corporations for the privilege of carrying on business is based on the wisest conclusions.

There is a radical difference between the advantages, opportunities and powers of corporations and individuals. Indeed, the race is so uneven between the natural person and the corporations that the former is being almost driven from the important enterprises of the day. All the great schemes that are undertaken and carried out are under the control and ownership of corporate organizations. If the enterprise fails, the individuals escape any further liability than the investment of capital; at least this is so in Colorado. The duty which the corporation owes to the public is entirely different from that which the individual owes. For instance, the individual is subject to military duty, jury duty and service in a posse comitatus, and other duties belonging to a citizen. If he violates any criminal statute in the transaction of business, he is subject to fine and imprisonment, and possibly both; while, in the case of the corporation, it escapes with a fine.

If the discrimination made in the statute passed in the case of the American Sugar Refining Company vs. Louisiana is based upon a reasonagle distinction in principle, we think it follows wth equal force that the power to tax corporations for the privilege of doing business is not an unjust discrimination, because natural persons are exempt. There is no invidious distinction, for all corporations are taxed.

It is true this court has held in *Connolly vs. Union Sewer Pipe Company,* 184 U. S., 540, at 562. that a state has not the power to pass a statute making a certain transaction criminal in the case of a corporation, and allowing natural persons to do the same thing with impunity. But there is the soundest reasoning for the prohibition in this particular, because an act which is criminal if done by a corporation, is equally so if done by an individual.

It is not necessary to advert to those decisions which sustain a different method of assessing the property of corporations from that of individuals. These statutes are sustained because of the essential difference in the nature of the property, and the impossibility of arriving at its value in the same manner as is used in assessing the personal and real property of individuals. Cases of this nature are:

Adams Express Co. vs. Ohio, 166 U. S., 194.

American Express Company vs. Indiana, 165 U. S., 255.

Pacific Express Company vs. Seibert, 142 U. S., 339, 350.

But in the case of McHenry vs. Alford, 168 U. S., 651, the court held that it was not an unjust discrimination to tax the Northern Pacific Railroad as a unit, including its railroad right of way and equipment, and also a large land grant that was not used in the operation of the road.

> " * * * a state statute defining an express company to be such as carried on the

business of transportation on contracts for hire with railroad or steamboat companies, did not invidiously discriminate against the express companies defined by it, by exempting other companies carrying express matter in vehicles of their own. This case is specially pertinent to the one under consideration."

American Sugar Refining Co. vs. Louisiana, 179 U. S., 89, 95.

In New York

"a license fee upon the entire class of persons acting within the state as agents for associations of individual fire underwriters not incorporated under the laws of the state, while the agents of domestic fire insurance corporations were not subject thereto, was held not to involve the unequal application of a tax."

Fire Department vs. Stanton, 159 N. Y., 225.

The right to tax collateral inheritances, as distinguished from those that are direct, the former being subject to taxation, the latter not, has been sustained.

Foreign insurance companies have been distinguished from domestic companies and taxed independently and differently.

Germania Life Ins. Co. vs. Com., 85 Pa., 515.

Commonwealth of Pa. vs. Del. Div. Canal Co., 2 L. R. A., 798, 803.

"It will be perceived that by the Constitution of California, in assessing the property of natural persons for taxation, deduction was to be made for the amount of mortgages thereon; but in the case of railroads no such deduction should be made. It may be proper to state that both these cases were taken to the Supreme Court; but the constitutional questions were not decided in either by that court. The San Mateo case was settled before a decision was rendered; and in the Santa Clara case the court declined to decide the constitutional question, placing its judgment of affirmance on other grounds."

Singer Mfg. Co. vs. Wright, 33 F., 121, 125.

"It appears that under the statute the bonds of a corporation secured by mortgage are subject to taxation in the hands of the holders, while the debt of an individual secured by mortgage is exempt."

Simpson vs. Hopkins, 82 Md., 478, 488.

"We can not, then, assent to the proposition that the taxation of the bonds of a corporation secured by mortgage, while the debt of an individual so secured is exempt, is an arbitrary discrimination against corporations, or the holders of corporate securities.

"An individual's true worth for the purpose of taxation consists of his real and per-

sonal property, but in the case of a corporation its franchise, its borrowing power, its earning capacity, its real worth, are not represented merely by its visible property and shares of stock. The taxable value of a corporation is its bonded indebtedness, together with its stock. In support of this Justice Miller, in State Tax cases, 92 U. S., 605, said:

"It is, therefore, obvious that when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt, and of the shares of its capital stock."

"It is quite apparent, then, that this exemption of the mortgage debt of an individual, and taxation of the mortgage bonds of a corporation in the hands of the respective creditors, is not an arbitrary and unreasonable discrimination between the same classes of property. And unless the discrimination be arbitrary, then the wisdom of the exemption is within the discretion of the legislature, and is not subject to control by the courts."

Idem, pages 489-490.

"So far as the alleged exemption of the bonds of foreign corporations secured by

mortgages upon property wholly within the state is concerned, it is only necessary to say that should it be conceded that this class of bonds are exempt, there can be no question that the state can relinquish its right to tax the bonds of foreign corporations without affecting its power to tax the bonds of its own corporations owned by its citizens. Nor can the alleged exemption of the bonds of a corporation, which do not bear interest, be regarded as arbitrary discrimination. The difference between a security that produces interest, and one that does not, and the reasons for the taxation of the one and the exemption of the other, are both clear and obvious. The true test of a taxable value is the producing value to the owner.

"The second contention of the appellant is that the alleged discrimination in the taxation of the bonds is unconstitutional under the fourteenth amendment of the Constitution of the United States. Now, it has been shown that the discrimination in this case is not arbitrary or hostile, but is based upon sound reasons of public policy. In the case of Bell's Gap Railroad Co. vs. Pa., 134 U. S., 237, the Supreme Court said that the provision in the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways; that it was not intend-

ed to compel the state to adopt an iron rule of equal taxation. 'If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require.' And to the same effect are the cases of *Pacific Ex. Co. vs. Seibert*, 142 U. S., 339, and *Jennings vs. Coal R. Imp. Co.*, 147 U. S., 147. It follows, then, as section 88, of article 81, of the Code is not in conflict with the provisions of the fourteenth amendment of the Constitution of the U. S., that this contention of the appellants can not be maintained."

Simpson vs. Hopkins, 82 Md., 478, 490-491.

It has been repeatedly held that the right to classify property for taxation belongs exclusively to the state legislature, and its exercise will not be disturbed unless it is used for the purpose of oppression. If there is any just and reasonable basis for discrimination, it is not unjust to classify the subjects of taxation accordingly.

At first glance it may appear very unjust to exempt the mortgages and debts of private persons from taxation, and at the same time to require the taxing officers to tax the mortgages of railroads. But this discrimination has been sustained upon the soundest principles of reasoning.

Justice Brewer, in *Adams Express Company vs. Ohio*, 166 U. S., 194, 220, said:

> "Suppose an express company is incorporated to transact business within the limits of a state, and does business only within such limits, and, for the purpose of transacting that business, purchases and holds a few thousand dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses, so transacts business therein, that its stock becomes, in the markets of the state, of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purpose of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the credulity of taxing laws which reach only the one and ignore the other, while they who own tangible property not organized into a single producing plant will feel the injustice of a system which so misplaces the burden of taxation."
>
> Adams Express Co. vs. Ohio, 166 U. S., 185, 220.

In Paul vs. Virginia, 8 Wall., 168, 181, the court said:

> "At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursuit requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchises should be exercised in other states without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those states would soon pass into their hands. The principal business of every state would, in fact, be controlled by corporations created by other states."

In the case of every business carried on by a corporation, there is a decided advantage enjoyed over that possessed by the individual engaged in the same enterprise. This unmistakable difference is what gives rise to the multiplication of corporations that are seizing the entire business of the world today. Sound statesmanship demands on pure consideration of public policy that the business of the corporation be taxed, while the individual is exempt from a similar tax. The individual in business deserves encouragement just as reasonable as does the person who engages in tilling the soil.

I may conclude this subject by the following quotation from *Southern Gum Co. vs. Laylin*, 66 Ohio St. Rep., 578, 595:

"An excise tax may also be imposed on corporations to compensate the state for the additional burden sustained by the state and the people, by reason of property being held in artificial bodies, the persons comprising such bodies being exempt from liability to a great extent for the debts thereof. This ground of excise taxation was recognized in *Adler vs. Shitcbeck*, 44 Ohio St., 539, and was there applied to the liquor traffic because that business was there shown to impose additional burdens upon the state. So the aggregation of capital by corporations imposes additional burdens, and requires regulations not applicable to individuals."

Respectfully submitted,

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